IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0371
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
TRACY MARK DUTCHER,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053547

Honorable Michael Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Eric J. Olsson — Tucson
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Tracy Dutcher was convicted of illegally conducting an enterprise, conspiracy to commit unlawful possession and/or transportation of a dangerous drug for sale, two counts of use of wire communication in a drug or narcotic-

related transaction, and possession of a dangerous drug. The trial court suspended the imposition of sentence and placed Dutcher on probation for five years, ordering him to serve a six-month jail term as a condition thereof. On appeal, Dutcher challenges the trial court's denial of his motion for judgment of acquittal on count one, made pursuant to Rule 20(b), Ariz. R. Crim. P., 17 A.R.S., and renewed after the jury reached its verdicts, or, alternatively, his motion to vacate the conviction on that count pursuant to Rule 24, Ariz. R. Crim. P., 17 A.R.S. We affirm.

¶2 Dutcher was convicted of possessing a dangerous drug on or about November 8, 2004, a lesser-included offense of the charged offense of possession of a dangerous drug for sale in count four. He was acquitted of possession of a dangerous drug for sale in count six. He contends, as he did below, that because he was charged in count one with illegally conducting an enterprise based on the predicate offense of possession of a dangerous drug for sale, the conviction on that count cannot stand.

¶3 It is for the trial court to determine, in the exercise of its discretion, whether to grant or deny a post-verdict judgment of acquittal, and we will not disturb its decision on appeal absent an abuse of that discretion. *State v. Wilson*, 207 Ariz. 12, ¶ 11, 82 P.3d 797, 800 (App. 2004). Similarly, we will not disturb a trial court's ruling on a motion for new trial absent an abuse of the court's discretion. *State v. Hickle*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982). Whether considering the propriety of a Rule 20 motion before or after a verdict, "[a] judgment of acquittal is appropriate where there is 'no substantial evidence

to warrant a conviction.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting* Ariz. R. Crim. P. 20. "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). The court did not abuse its discretion here.

¶4 Section 13-2312(B), A.R.S., provides that "[a] person commits illegally conducting an enterprise if such person is employed by or associated with any enterprise and conducts such enterprise's affairs through racketeering or participates directly or indirectly in the conduct of any enterprise that the person knows is being conducted through racketeering." Section 13-2301(D)(4), A.R.S., defines racketeering as "any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country . . . and the act involves" certain acts "if committed for financial gain." Among those "acts" is "[p]rohibited drugs . . . or other prohibited . . . substances." § 13-2301(D)(4)(b)(xi).

¶5 In count one, Dutcher was charged with violating § 13-2312(B) by "illegally conducting an enterprise by being employed or associated in fact, and conducting or participating in the conduct of the affairs of such enterprise through racketeering, as set forth in" the remaining counts. Among those counts was count two: "conspiracy to commit unlawful possession and/or transportation of [a] dangerous drug for sale." This preparatory offense, *see* A.R.S. § 13-1003, involved illegal drugs and was, on its face and factually,

based on the evidence presented at trial, "committed for financial gain." § 13-2301(D)(4). The jury was instructed on the elements of the offense of illegally conducting an enterprise consistently with § 13-2312(B); it was also given the following definition of racketeering consistent with § 13-2301, though without reference to acts specified in any of the other counts of the indictment: "'Racketeering' means any act that would [be] chargeable under the criminal laws of this state if committed for financial gain and involving prohibited drugs, marijuana or other prohibited chemicals or substances." The jury found Dutcher guilty of that offense, which clearly provided the predicate offense for count one. Dutcher's contention that, "[a]s a matter of law," count two did not "allege racketeering acts" is unsupported. And nothing in *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (App. 1987), supports the proposition that conspiracy to commit unlawful possession and/or transportation of methamphetamine for sale is not a predicate act under § 13-2301(D)(4).

¶6 The state's theory of the case as to count one was broad enough to encompass the conspiracy count as one of the possible bases for the jury to find Dutcher guilty on count one. The prosecutor argued, "So then the question is, . . . did th[is] defendant[] associate with [his wife and codefendant Amy and others] . . . participate directly or indirectly in the conduct of those affairs knowing what was going on was drug dealing." The prosecutor added that the defendants had committed certain acts and had made telephone calls "to help sell methamphetamine on November 8th" in order to generate cash to post bail for their associate Timothy Owens, who was in jail and who was owed money for previous drug deals.

The prosecutor also argued that for a period of time, Dutcher had made a "conscious, deliberate choice to associate with a group of persons who were selling methamphetamine[,] . . . [that he] knew [they] were importing it, and when Tim Owens got caught in November they were moving forward." The evidence, viewed in the light most favorable to sustaining the verdict on count one, *see State v. Roseberry*, 210 Ariz. 360, ¶ 45, 111 P.3d 402, 410-11 (2005), supported the state's theory of the case on that count, and the jury clearly found sufficient evidence of the conspiracy charge, which was also amply supported by the evidence. There was sufficient evidence Dutcher "conducted or participated in the conduct of the affairs of the enterprise through racketeering, i.e., through the commission of at least one predicate offense." *Baines v. Superior Court*, 142 Ariz. 145, 149, 688 P.2d 1037, 1041 (App. 1984).

¶7 The state is also correct that Dutcher's acquittal of one of the charges of possession of drugs for sale and conviction only of the lesser-included offense of possession on the other did not necessarily mean the jury could not have found him guilty on count one based on possession of drugs for sale. Given the differences in the statutory elements for the offenses of racketeering under § 13-2312 and possession of illegal drugs, A.R.S. § 13-3407, we do not agree that the verdicts were inconsistent. But, even assuming that to be the case, inconsistent verdicts are permissible. *See, e.g.*, *Evanchyk v. Stewart*, 202 Ariz. 476, ¶ 17, 47 P.3d 1114, 1119 (2002) (finding defendant could be convicted of conspiracy to commit first-degree murder and of completed offense of second-degree murder, even though verdicts

were inconsistent under facts of case); *State v. DiGiulio*, 172 Ariz. 156, 162, 835 P.2d 488, 494 (App. 1992) (finding defendant could be convicted of trafficking in stolen property even if acquitted of theft because "[t]here is no constitutional requirement that verdicts be consistent").

¶8 The court did not abuse its discretion in denying Dutcher's post-trial motions that challenged the conviction on count one. Therefore, the convictions and the sentences imposed are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Judge

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PHILIP G. ESPINOSA, Judge